

R602-7 Adjudication of Discrimination Claims.

R602-7-1 Statutory Authority:

Section 34A-5-107 (5) (c) provides a right for a person filing a charge of discrimination with the Utah Antidiscrimination and Labor Division to file a written request to the Division of Adjudication for an evidentiary hearing to review de novo a determination and order issued by the Utah Antidiscrimination and Labor Division. Section 34A-5-107(13) authorizes the Labor Commission to establish rules governing these proceedings.

R602-7-2 Applicability of Rule.

The provisions of R602-7 pertaining to requests for hearing pursuant Section 34A-5-107 (5) (c) supersede the Administrative Rules contained in R602-2, R602-3, R602-4, R602-5, R602-6 and R602-8 as to any actions brought pursuant to Section 34A-5-107 (5) (c).

R602-7-3 Adjudication of Actions Commenced Pursuant to Section 34A-5-107 (5) (c).

1. Pleadings and Discovery.

a. Definitions.

i. "Commission" means the Labor Commission.

ii. "Division" means the Division of Adjudication within the Labor Commission.

iii. "Request for De Novo Review" pursuant to Section 34A-5-107 (5) (c) means a written request filed with the Commission and directed to the Division requesting de novo review of a specific Determination and Order issued by the Utah Antidiscrimination and Labor Division and shall include the following:

A. the name, mailing address and telephone number of the party seeking de novo review and of their attorney, if applicable.

B. the name, mailing address and telephone number of the opposing parties and of their attorney if applicable

C. the date the Determination and Order was issued by the Utah Antidiscrimination Division.

D. a request for relief, specifying the type and extent of relief requested, and a statement of facts supporting the requested relief.

E. a copy of the initial Charge of Discrimination filed with the Utah Antidiscrimination Division and a copy of the Determination and Order.

iv. "Petitioner" means the charging party in the original case resulting in the Determination and Order issued by the Utah Antidiscrimination and Labor Division.

v. "Respondent" means the respondent in the original case resulting in the Determination and Order issued by the Utah Antidiscrimination and Labor Division.

b. Scheduling Conference.

Upon receipt of the Request for De Novo Review the Division will schedule a scheduling conference to be attended by the parties and/or their attorneys. Following the scheduling conference the Division will issue a Scheduling Order containing deadlines and requirements for the filing of Petitioner's Statement, deadlines and requirements for the filing of Respondent's Answer, discovery deadlines, motion deadlines and any other deadlines deemed appropriate for the orderly administration of the case as determined by the administrative law judge assigned to the case.

c. Discovery.

i. (A) Required disclosures; Discovery methods.

I. Initial disclosures. Except in cases exempt under subdivision (c)(i)(A)(II) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

Aa. the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

Bb. a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

Cc. a computation of any category of damages claimed by the disclosing party, making available for inspection and copying all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

Dd. Unless otherwise stipulated by the parties or ordered by the administrative law judge, the disclosures required by subdivision (c)(i)(A)(I) shall be made within 14 days after the disclosure meeting of the parties under subdivision (c)(i)(E). A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

II. Disclosure of expert testimony.

Aa. A party shall disclose to other parties the identity of any person who may be used at hearing to present expert opinion evidence.

Bb. Unless otherwise stipulated by the parties or ordered by the administrative law judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness.

III. Prehearing disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at hearing other than solely for impeachment:

Aa. the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

Bb. an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Cc. Disclosures required by subdivision (c)(i)(A)(III) shall be made at least 30 days before hearing.

IV. Form of disclosures. Unless otherwise stipulated by the parties or ordered by the administrative law judge, all disclosures shall be made in writing, signed and served.

V. Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

B. Discovery scope and limits. Unless otherwise limited by order of the administrative law judge in accordance with these rules, the scope of discovery is as follows:

I. In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

II. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party shall expressly make any claim that the source is not reasonably accessible, describing the source, the nature and extent of the burden, the nature of the information not provided, and any other information that will enable other parties to assess the claim. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the administrative law judge may order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (c)(i)(B)(III). The administrative law judge may specify conditions for the discovery.

III. Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (c)(i)(A)(V) shall be limited by the administrative law judge if it determines that:

Aa. the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

Bb. the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

Cc. the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The administrative law judge may act upon his or her own initiative after reasonable notice or pursuant to a motion under Subdivision (c)(i)(C).

IV. Hearing preparation: Materials.

(Aa) Subject to the provisions of Subdivision (c)(i)(B)(V) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (c)(i)(B)(I) of this rule and prepared in anticipation of litigation or for

hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Bb. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order. The provisions of Rule 37(a)(4) U. R. C.P. apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

V. Hearing preparation: Experts.

A party may depose any person who has been identified as an expert whose opinions may be presented at hearing.

VI. Claims of Privilege or Protection of Hearing Preparation Materials.

Aa. Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as hearing preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Bb. Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as hearing-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the administrative law judge under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

C. Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action by the administrative law judge, and for good cause shown, the administrative law judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

I. that the discovery not be had;

II. that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

III. that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

IV. that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

V. If the motion for a protective order is denied in whole or in part, the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) U. R. C. P. apply to the award of expenses incurred in relation to the motion.

D. Supplementation of responses. A party who has made a disclosure or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the administrative law judge or in the following circumstances:

I. A party is under a duty to supplement at appropriate intervals disclosures if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required the duty extends both to information contained in the report and to information provided through a deposition of the expert.

II. A party is under a duty reasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

E. Disclosure Meeting. The following applies to all cases.

I. Within thirty (30) days of the date of the scheduling order the parties shall meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by this rule, to discuss any issues relating to preserving discoverable information and to develop a stipulated discovery plan. Respondent's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the disclosure plan.

II. The plan shall include:

Aa. what changes should be made in the form or requirement for disclosures under subdivision (c)(i)(A);

Bb. the subjects on which discovery may be needed;

Cc. any issues relating to preservation, disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

Dd. any issues relating to claims of privilege or of protection as hearing-preparation material;

III. The discovery plan of the parties shall only be filed with the Division as an attachment to any discovery motion.

F. Signing of discovery requests, responses, and objections.

I. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

II. If a certification is made in violation of the rule, the administrative law judge, upon motion or upon his or her own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

G. Filing. A party shall only file disclosures or requests for discovery with the Division as an exhibit to a discovery motion.

ii. Subpoenas.

Subpoenas may only be issued by the administrative law judge assigned to the case or the presiding judge if the assigned administrative law judge is unavailable. Commission subpoena forms shall be used in all discovery proceedings. Subpoenas shall be issued at least seven business days prior to a scheduled hearing or appearance unless good cause is shown for a shorter period. Witness fees and costs shall be paid by the party requesting the subpoena pursuant to Utah Code Section 34A-1-302 (c).

iii. Parties conducting discovery under this rule shall maintain mailing certificates and follow up letters regarding discovery to submit in the event Division intervention is necessary to complete discovery. Discovery documents shall not be filed with the Division at the time they are forwarded to opposing parties.

iv. Sanctions. Any party who fails to obey an administrative law judge's discovery order shall be subject to the sanctions available under Rule 37, Utah Rules of Civil Procedure.

d. Notices

i. Orders and notices mailed by the Division to the last address of record provided by a party is deemed served on that party.

ii. Where an attorney appears on behalf of a party, notice of an action by the Division served on the attorney is considered notice to the party represented by the attorney.

R602-7-4. Hearings.

1. Evidentiary hearings shall be conducted formally in accordance with Utah Code § 63G-4-206. The petitioner shall have the burden of proving the claim of discrimination by a preponderance of substantial evidence. After the close of the proceedings, the administrative law judge will issue an order pursuant to Utah Code Section 63G-4-208.

2. In those cases where the Utah Antidiscrimination and Labor Division in its Determination and Order made a reasonable cause finding, the Utah Antidiscrimination and Labor Division shall be given an opportunity at the evidentiary hearing to briefly outline the basis of its Determination. The presentation by the Utah Antidiscrimination and Labor Division shall not be considered evidence by the administrative law judge in issuing an order.

R602-7-5 Motions for Review.

1. Any party to an adjudicative proceeding may obtain review of an Order issued by an administrative law judge by filing a written request for review with the Division in accordance with the provisions of Utah Code §§ 34A-5-107 (11) and 63G-4-301. Unless a request for review is properly filed, the administrative law judge's order is the final order of the Commission. If a request for review is filed, other parties to the adjudicative proceeding may file a response within 20 calendar days of the date the request for review was filed. Thereafter, the administrative law judge shall:

- a. Reopen the case and enter a Supplemental Order after holding such further hearing and receiving such further evidence as may be deemed necessary;
- b. Amend or modify the prior order by a Supplemental Order, or
- c. Refer the entire case for review.

2. If the administrative law judge enters a Supplemental Order, as provided in this subsection, it shall be final unless a request for review of the same is filed.

R602-7-6. Request for Reconsideration

A request for reconsideration of an Order on Motion for Review may be allowed and shall be governed by the provision of Utah Code Section 63G-4-302. Any petitioner for judicial review of final agency action shall be governed by the provisions of Utah Code Section 63G-4-401.

Key

discrimination, administrative procedure, hearings, settlements

Date of Enactment or Last Substantive Amendment: July 1, 2008

Authorizing, Implemented or Interpreted Law

34A-5-107; 63G-4-102 et seq.